

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

FRANKLIN SMITH,)	
)	
Plaintiff,)	
vs.)	NO. CIV-16-0394-HE
)	
MANTLE, <i>et al.</i> ,)	
)	
Defendants.)	

ORDER

Plaintiff Franklin Smith, a state prisoner appearing *pro se* and *informa pauperis*, filed this § 1983 action against multiple defendants alleging violations of his constitutional rights. Consistent with 28 U.S.C. § 636(b)(1)(B)-(C), the matter was referred to Magistrate Judge Shon T. Erwin for initial proceedings. After numerous rulings, defendants David Baisden and Stacy Bowein, an Oklahoma City police officer, are the only remaining defendants in the action. Plaintiff claims defendant Bowein used excessive force when arresting him and defendant Baisden, an employee of a private security company, failed to intervene to prevent the exercise of excessive force. Defendant Baisden filed a motion for summary judgment based on qualified immunity, which the Magistrate Judge recommends be denied.¹

In his Report the magistrate judge initially noted that an officer cannot not be held liable for failing to intervene in the absence of an underlying violation of excessive force.

¹ Defendant Bowein filed a separate motion for summary judgment, which the court previously denied. See Doc. #86.

Because he had previously concluded that issues of material fact exist regarding whether defendant Bowein used excessive force in arresting plaintiff in violation of the Fourth Amendment, the magistrate judge proceeded to consider “whether there was a realistic opportunity for Defendant Baisden to have intervened to prevent the harm from occurring.” Doc. #87, p. 7. He concluded a dispute exists as to this issue also, based on the parties’ “competing version of events.” *Id.* at p. 10. The magistrate judge also rejected defendant Baisden’s argument that summary judgment is warranted due to plaintiff’s lack of damages. He therefore concluded that defendant Baisden’s motion for summary judgment should be denied.

Defendant Baisden failed to object to the Report. He thereby waived any his right to appellate review of the factual and legal issues it addressed. Casanova v. Ulibarri, 595 F.3d 1120, 1123 (10th Cir. 2010); *see* 28 U.S.C. §636(b)(1)(C). Plaintiff filed two objections, but in both he essentially states that he agrees with the magistrate judge’s Report.

Accordingly, the court adopts Magistrate Judge Erwin’s Report and Recommendation. Defendant Baisden’s motion for summary judgment [Doc. #65] is **DENIED.**

IT IS SO ORDERED

Dated this 19th day of March, 2018.


JOE HEATON
CHIEF U.S. DISTRICT JUDGE

